

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking to Consider the
Adoption of a General Order and Procedures to
Implement the Digital Infrastructure and Video
Competition Act of 2006.

R.06-10-005
(Filed October 5, 2006)

**AT&T CALIFORNIA'S APPLICATION FOR REHEARING
OF DECISION 07-10-013
(FILED OCTOBER 5, 2007)**

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AT&T California, pursuant to Public Utilities Code section 1731(b) and Rule of Practice and Procedure 16.1 of the California Public Utilities Commission (“Commission”), hereby applies for rehearing of Commission Decision 07-10-013, filed October 5, 2007 (hereinafter, “Decision”). As explained below, the Decision’s requirement that each franchise holder report the number of subscribers by census tract is unlawful.

I. INTRODUCTION

The Digital Infrastructure and Video Competition Act of 2006 (“DIVCA” or “the Act”) repeatedly emphasizes that the Commission has very limited authority over video services and video service providers. In two separate provisions, DIVCA clarifies that the Commission’s broader authority over public utilities does not apply to video service providers. Section 5810(a)(3) states that “video service providers *are not public utilities* or common carriers,”¹ and section 5820(c) confirms that “[t]he holder of a state [video] franchise *shall not be deemed a public utility* as a result of providing video service....”²

Consistent with this intent, the plain and express language of DIVCA carefully limits the Commission’s authority:

Neither the commission nor any local franchising entity or other local entity of the state may ... *impose any requirement* on any holder of a state franchise *except as expressly provided* in [DIVCA].³

DIVCA sections 5920 and 5960 set forth *the* reporting requirements of DIVCA. Neither of these sections, nor any other section, of DIVCA requires each franchise holder to report the number of subscribers by census tract, thus the Decision’s imposition of such a requirement is unlawful.

¹ Pub. Util Code § 5810(a)(3) (emphasis added). All statutory references are to the Public Utilities Code unless otherwise indicated.

² § 5820(c) (emphasis added).

³ § 5840(a) (emphasis added).

In attempting to justify this additional reporting requirement, the Decision opines,

We disagree that the imposition of further reporting requirements violates DIVCA. However, we agree generally with the comments of current or potential providers of video programming and broadband services that DIVCA intends video programming and broadband services to be offered in a competitive environment, and that the Commission should avoid imposing additional data requirements that impose a heavy burden on service providers yet do not assist the Commission in carrying out its role.⁴

In other words, the Decision concludes DIVCA authorizes additional reporting requirements so long as they (1) “assist the Commission” and (2) do not “impose a heavy burden on service providers.” This conclusion is contrary to the plain language of DIVCA. Nowhere does DIVCA allow the Commission to impose reporting requirements as long as they “assist the Commission” and do not impose “a heavy burden.” To the contrary, DIVCA plainly states that the Commission may not “*impose any requirement on any holder of a state franchise except as expressly provided in [DIVCA].*”⁵

II. DISCUSSION

The Decision would require each franchise holder to report the number of households in each census tract of its service area that subscribe to its video service,⁶ claiming this “data will be useful for ensuring enforcement of the non-discrimination and build-out provisions of Section 5890,”⁷ and that “video subscriber data will be necessary information for the Commission so that it can determine whether to initiate action on its own motion to enforce Section 5890(a).”⁸ To

⁴ Decision, *mimeo*, pp. 21-22.

⁵ § 5840(a) (emphasis added).

⁶ See Decision, *mimeo*, pp. 22 (Ordering Paragraph 2.c).

⁷ *Id.* at 22-23.

⁸ *Id.* at 24.

the contrary, this new reporting requirement violates DIVCA and will not assist the Commission in enforcing section 5890(a).

First, as discussed above, DIVCA does not authorize the Commission to impose reporting requirements it merely deems to be “useful” or even “necessary” in ensuring enforcement of the Act. Instead, DIVCA expressly prohibits the Commission from “*impos[ing] any requirement* on any holder of a state franchise *except as expressly provided* in [DIVCA].”⁹ DIVCA even enumerates the reporting requirements the Commission may impose, and subscriber data is not one of them.¹⁰ Indeed, prior to its passage, the Legislature *removed* from DIVCA a provision that would have required reporting of “[t]he number of households in each census tract that use video service provided by the holder or its affiliates.”¹¹ Such rejection by the Legislature is a “most persuasive” indication that the legislation should not be interpreted to include the omitted provision.¹² Thus, the Decision’s imposition of a new requirement to report subscribers by census tract is contrary to the plain language of DIVCA and the clear intent of the Legislature.

Second, the Commission’s authority to regulate public utilities does not allow it to impose a video subscriber reporting requirement, or any other requirement, on video service providers. Again, DIVCA plainly provides that “video service providers *are not public utilities*

⁹ § 5840(a) (emphasis added).

¹⁰ §§ 5920, 5960.

¹¹ Compare AB2987 as amended in Senate August 23, 2006, p. 15, § 5840(n)(1)(F) (available at <http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_bill_20060823_amended_sen.pdf>) with AB2987 as amended in Senate August 28, 2006, pp. 18 (text of § 5840(n)(1)(F) stricken as deleted), 41-42 (§ 5960(b)(1) and (2) added), (available at <http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_bill_20060828_amended_sen.pdf>).

¹² *Rich v. State Board of Optometry* (1965), 235 Cal.App.2d 591, 607 (citations omitted).

or common carriers,”¹³ and that “[t]he holder of a state [video] franchise *shall not be deemed a public utility* as a result of providing video service....”¹⁴

Third, contrary to the Decision’s reasoning, subscriber data by tract are not “necessary information for the Commission so that it can determine whether to initiate action on its own motion to enforce Section 5890(a).”¹⁵ DIVCA prohibits income-based discrimination in offering *access* to potential subscribers, it does not require a certain composition of *actual* subscribers.

Section 5890(a) provides (emphasis added),

A cable operator or video service provider that has been granted a state franchise under this division may not discriminate against or deny *access to service* to any group of *potential* residential subscribers because of the income of the residents in the local area in which the group resides.

The very next subsection, 5890(b), provides that franchise holders such as AT&T meet the requirements of 5890(a) if certain milestones are satisfied¹⁶ regarding the percentage of households “*with access to the holder’s video service.*”¹⁷ The Act defines “access” to mean “that the holder is capable of providing video service at the household address...regardless of whether any customer has ordered service....”¹⁸ Accordingly, DIVCA requires the reporting of the number of households “offered” video service,¹⁹ and the number of low-income households “offered” video service.²⁰ Thus, DIVCA’s plain language makes clear that its non-discrimination requirement applies to “access,” not subscriber composition. Of course this reflects two

¹³ § 5810(a)(3) (emphasis added).

¹⁴ § 5820(c) (emphasis added).

¹⁵ Decision, p. 24.

¹⁶ The holder must also meet certain community center requirements. § 5890(b)(3).

¹⁷ § 5890(b)(2) (emphasis added). This provision makes plain that franchise holders have three years to meet DIVCA’s non-discriminatory access requirement. Thus, any related reporting before then is unnecessary.

¹⁸ § 5890(j)(4).

¹⁹ § 5960(b)(2)(A)(ii).

²⁰ § 5960(b)(3)(ii).

important realities: (1) no rational new entrant would make the sizable capital investment necessary to provide access to video service in a particular area, and then refuse to sell it; and (2) franchise holders cannot force customers to actually subscribe to their service.

Fourth, it would be particularly inappropriate to require new entrants to report geographically granular subscriber data. Such data are highly proprietary trade secrets. As new entrants sign up customers, the number and location of those customers can easily be used by incumbent competitors to identify a new entrant's rollout plans. The incumbent can then target promotional offerings and deny the benefits of such offerings to its broader customer base. Even if done on an "aggregated" basis, reporting of such data for geographic areas where there is only one franchise holder would reveal that holder's detailed subscriber data. Nonetheless, the Decision only provides that new entrant video subscriber data "may" be accorded proprietary treatment.²¹

Fifth, compliance with the nondiscrimination and build-out requirements of section 5890 is measured at the level of the provider's entire service area.²² Because the requirements do not apply on a census tract basis, the Commission has no need to see subscriber data at the census tract level.

²¹ Decision, p. 24.

²² Providers are already required to report the total number of video subscribers annually, per G.O. 169. General Order 169, p. 19 (section D(2)).

III. CONCLUSION

As set forth above, AT&T California requests the Decision be corrected by removing the unlawful provisions that impose the additional requirement to report subscriber data by census tract.

Respectfully submitted,

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DATED: November 5, 2007

CERTIFICATE OF SERVICE

I, Agnes Ng, certify that I have this day caused a true copy of the original attached AT&T CALIFORNIA'S APPLICATION FOR REHEARING OF DECISION 07-10-013 in R.06-10-005 to be served by electronic mail, US mail, or hand delivery on all parties on the service list for this proceeding.

Dated this 5th day of November 2007 at San Francisco, California 94105.

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